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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-719

UNITED STATES DISTRICT COURT FOR HAWAII and SAMUEL P. KING, UNITED STATES DISTRICT JUDGE

and

KURT BOYER, RENE CRISANTO LICHAUCO, RUSSELL FRANKLIN BARNETT, JR., MICHAEL PAUL MEYER, JEFFREY FRED CHOY HEE, MITCHELL ANDREW MCCONNELL, DAVID PAUL TURLEY, and THOMAS LEONARD BARTHEL, III, Real Parties in Interest, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

UNITED STATES OF AMERICA, *Respondent.*

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The undersigned attorneys, on behalf of the above-named Petitioners, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The various orders of the Court of Appeals (Appendices A, B, C, D and E, *infra*) are not reported. The District Court's unpublished order of December 18, 1974, is Appendix G, page 7a.

JURISDICTION

On June 25, 1975, the Court of Appeals for the Ninth Circuit granted the Government's petition for a writ of mandamus requiring the District Court to vacate its order granting appointed counsel access to the selective service files of each of the respective petitioners. A petition and suggestion for rehearing *en banc* was denied on August 18, 1975 (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Does a court of appeals have power to adjudicate a petition for interlocutory review in a criminal case where the procedural order of the district court could not possibly have the effect of a dismissal?

2, Is it appropriate for a court of appeals to establish an exception to an express holding by the Supreme Court without setting forth any reasons or guidelines therefor?

3. Should a district court have the power, free from interference by interlocutory mandamus, to order the appointment of counsel in a criminal case?

ACKNOWLEDGMENT OF A PENDING PETITION FOR CERTIORARI IN A SIMILAR CASE

Petitioners acknowledge the filing by Professor Louis Lusky of a petition for Writ of Certiorari in a related case, viz., *Austin, et al.* v. *United States of America and Hon. Jack B. Weinstein,* No. 74-1170 (1974); cert. denied, —— U.S. ——, 43 L.W. 3674 (6-24-75); petition for rehearing of order denying certiorari presently pending.

STATEMENT OF FACTS

On November 6, 1974, the Honorable Samuel P. King (hereinafter Petitioner King) entered a Memorandum and Order appointing three attorneys, David Bettencourt, John S. Edmunds, and Eric A. Seitz, to represent the interests of fifteen persons indicted for alleged selective service violations in the District of Hawaii. (A copy of Petitioner King's Order is contained in Appendix F hereto.)

As Petitioner King stated in his Order:

> In each of the 15 selective service cases pending before this Court[1], the defendants have been indicted but the prosecutions have not gone forward because the defendants are allegedly fugitives. As a result of their allegedly fugitive status, no defense counsel have been representing them. In view of current events[2] this lack of legal representation may prejudice their positions.
>
> (App. F, p. 1)

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[1] Since the entry of that original order, the following cases were removed from this action; *United States* v. *McKenna*, Cr. No. 12567 (dismissed by the United States Attorney); *United States* v. *Yiznitsky*, Cr. No. 74-115 (defendant has retained other counsel and is awaiting trial); *United States* v. *Woolley*, Cr. No. 12814 (defendant is participating in the President's Clemency Program); *United States* v. *Roth*, Cr. No. 12560, *United States* v. *Akutagawa*, Cr. No. 13111, *United States* v. *Allen*, Cr. No. 13062, and *United States* v. *Heyns*, Cr. No. 74-116 (selective service files in question have been turned over to the attorneys following presentation of signed authorizations).

[2] The particular current event, of which the Court took judicial notice, was the President's announcement and implementation of a Clemency Program for Vietnam era military deserters and selective service violators.

Unlike the *Austin* case, *supra,* the United States Attorney did not object to this appointment of counsel and did not move to vacate said appointment. On December 11, 1974, appointed counsel filed a motion for discovery requesting, *inter alia,* an order permitting them to inspect and/or copy the selective service files in question, which motion was granted after a hearing. The United States Attorney again did not contest the motion for discovery on the grounds that defense counsel should not have been or were improperly appointed.

The compliance date for Respondent-Petitioner King's discovery order of December 18, 1974, was "on or about January 3, 1975." (App. G) The United States Attorney failed to obtain a stay of that order until January 8, 1975, on which date Petitioner King stayed his discovery order pending a petition for mandamus or prohibition to the United States Court of Appeals for the Ninth Circuit.

On January 22, 1975, the Court of Appeals denied the petition for mandamus and prohibition without written opinion (App. A). On January 31, 1975, Petitioner King continued the stay pending a petition for rehearing which was filed in the Court of Appeals on February 2, 1975. On February 13, 1975, the Ninth Circuit Court vacated its former order and allowed responses to the petition to be filed (App. B). Additional briefs were requested and submitted concerning any effect on the litigation resulting from the lapse of the President's Clemency Program.

Thereafter, on June 25, 1975, the Court of Appeals granted the petition for writ of mandamus (App. D) and, as noted above, denied Petitioners' petition and

suggestion for rehearing *en banc* on August 18, 1975 (App. E).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' grant of a Writ of Mandamus, without opinion, reviewing an interlocutory procedural order in a criminal case which could not possibly have had the effect of a dismissal, runs contrary to an express holding of this Court and raises the significant question of what guidelines, if any, a Circuit Court must follow in issuing writs curtailing the power of a District Court.

In *Will* v. *United States*, 389 U.S. 90, 95-96 (1967) this Court noted it ". . . has never approved the use of the writ [of mandamus] to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal."

Yet in the present case, the Court of Appeals granted a writ of mandamus under circumstances where it was impossible for the procedural order in question to ". . . have the effect of a dismissal." Id.[3] The Court of Appeals issued a writ of mandamus directing the District Court to "set aside" its order granting discovery of the Defendants' selective service files to their court-appointed counsel (Appendix D). If allowed to stand, the order granting counsel access to these files obviously could not have the effect of a dismissal. Because the Court of Appeals rendered its decision without opinion, it remains unclear how, if at all, that Court

[3] The present action differs in this respect from the situation in *United States of America* v. *Hon. Jack B. Weinstein*, 511 F. 2d. 622 C.A.N.Y. (1975) since Judge Weinstein had entertained motions for dismissal of the indictments made by appointed counsel on behalf of the defendants; it was Judge Weinstein's decisions on such motions that were there the subject of the government's request for mandamus. No such motions have been made in this case nor has Petitioner Judge King indicated whether he will entertain them.

sought to reconcile its decision with the opinion in *Will* v. *United States, supra.* Indeed, the Court of Appeals failed even to find that there had been any judicial "usurpation of power" despite the well-established existence of this requirement before mandamus will be granted. *See, e.g., Will* v. *United States, supra; United States* v. *Smith,* 331 U.S. 469 (1947); *De Beers Consol. Mines Ltd. v. United States,* 325 U.S. 212, 217 (1945); *Ex parte United States,* 287 U.S. 241 (1932); *Ex parte United States,* 242 U.S. 27 (1916); *United States* v. *Mayer,* 235 U.S. 55. We also recognize that the language of *Will* carries a third possibility: when this Court stated "We need not decide under what circumstances, if any, such a use of mandamus would be appropriate", 389 U.S. 90, 96, the Circuit Court in this case may have believed such language to suggest that this Court intended to reserve decisions on such matters to the Circuit Courts. We frankly doubt that such was this Court's intent; the sentence preceding his quotation in *Will* certainly suggests strong disapproval by this Court of the use of mandamus under such circumstances. Yet the question of ". . .under what circumstances, if any, such a use of mandamus would be appropriate", 389 U.S. 90, 96, has been raised by the Court of Appeals' opinion in this case. This Court should define the ". . . circumstances, if any, . . ." justifying mandamus and not leave it to Circuit Courts, especially those writing without opinion, to review such interlocutory procedural orders. As we will demonstrate, in the present case, the consequence of leaving undefined such ". . . circumstances, if any, . . ." raises serious questions regarding the power of Federal District Courts and the concomitant rights of defendants such as Petitioners-Defendants in this case.

In short, the Court of Appeals in this case sought to extend *Will* to review of an interlocutory procedural order in a criminal case which could not conceivably have had the effect of a dismissal. If, in fact, *Will* no longer governs such cases, this Court should grant certiorari and write new guidelines. Alternatively, if *Will* still governs the use of mandamus to review interlocutory procedural orders in criminal cases, this Court should so state and/or should require that Courts of Appeal justify apparent deviation from *Will's* requirements in written opinions.

II. A federal district court should have the power, free from interference by interlocutory mandamus, to order the appointment of counsel in a criminal case.

A primary ground for the District Court's appointment of counsel in these cases was Petitioner King's concern that selective service defendants required legal counsel in deciding whether to accept President Ford's offer of clemency. (Appendix F, p. 6a.) Yet when the deadline for enrollment in the clemency program passed on March 31, 1975, the Government continued to press for issuance of a writ of mandamus.

We submit that imminency of the deadline for enrollment in the clemency program was the only consideration which could support the Court of Appeals' grant of extraordinary relief and when that deadline passed, there was nothing about these cases that could not first be presented for resolution in the District Court and litigated like any other criminal case.[4]

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[4] Implicitly, the Government agrees with this position since it acknowledged that a direct appeal could be taken from any order for suppression or dismissal entered as a result of the Government's failure to comply with the order for discovery. Petition for Mandamus, pp. 6-7.

By granting the petition for mandamus on June 25, 1975, after expiration of the clemency program, the Court of Appeals acted in the apparent absence of any need for extraordinary relief. More significantly, by doing so without issuing a written opinion, the Court of Appeals left unsettled the question of the Petitioner King's power to appoint counsel or to take any action in the selective service cases remaining on the District Court's docket.

Admittedly, it is the order granting discovery, and not the original appointing order, that is the focus of consideration herein. However, if a District Court's power to appoint counsel is to constitute anything more than a meaningless ritual which the Government can counteract by interlocutory mandamus, then the existence of that appointing power necessarily implies that appointed counsel can perform some functions.[5]

A second purpose for the appointing order was the District Court's legitimate inquiry as to the status of pending criminal cases.

> Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.
>
> *Ex parte Peterson*, 253 U.S. 300, 312, 313 (1920).

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[5] For example, examination of the indictment and selective service file might disclose a basis for a stipulated dismissal of the prosecution in light of an obvious procedural error, as it did in the case of Defendant McKenna.

The Government has argued that because the defendants are "fugitives," appointed counsel have no standing to represent them.[6]

This attempt to brand the defendants as "fugitives," based solely upon a failure to apprehend them, may well have legal significance in some situations; however, in the present cases, it has served only as a circular argument to prevent the defendants, their court-appointed counsel, and the District Court from taking any steps to evaluate or resolve their actual present status.

Not all of the defendants are necessarily "fugitives," despite the Government's assertion. Indeed, in many of those cases where contacts have been made and authorizations obtained, the defendants either have previously surrendered to federal authorities or have been entirely unaware of their indictments and the reasons therefor. The only feasible way for appointed counsel to locate and contact their remaining clients to determine their status is through access to the addresses and other biographical information which is contained in the selective service files.

Yet, by presuming fugitive status and using that presumption as a claimed basis to prevent appointed counsel from obtaining access to the files, the Government thereby ensures its ability to continue pending

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[6] The Government has undercut its own position by asserting that with written authorizations, counsel could have access to the selective service files. And in the Second Circuit, the Government stated that it would not object to appointed counsel's filing of motions attacking the indictments of absent defendants so long as counsel obtained written authorizations from their clients. *United States* v. *Weinstein, supra.*

prosecutions free from any supervision or review by the District Court.

We submit, however, that the District Court has the power to inquire into the status of criminal cases pending on its docket and is in no way required to share the Government's conclusive presumption regarding the fugitive status of all such defendants.

Additionally, an obvious implication of the Court's power to appoint counsel for a defendant is the necessity and obligation for counsel to contact their clients; these tasks of defense counsel do not evaporate merely because a client's whereabouts may be unknown or because the Government presumes to know the intent and reasons for the client's absence.

Thus, the Government's refusal to open its selective service files to appointed counsel is, in fact an effort to frustrate counsel's fulfillment of *any* functions in behalf of their clients. More importantly, in the absence of clearer guidelines from the Court of Appeals, issuance of the writ of mandamus herein raises serious questions about the power of the District Court to make any appointments or take any steps to supervise or affect the status of criminal cases on its own docket.

CONCLUSION

For the reasons set forth above, certiorari should be granted and this Court should either reaffirm the holding of *Will* v. *United States, supra*, or write new standards governing the issuance of an interlocutory order in a criminal case (where such order does not result in a dismissal). In the alternative, upon a

grant of *certiorari*, this Court should remand the case to the Court of Appeals for a written opinion.

Respectfully submitted,

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[7] Counsel for Petitioners United States District Court and Samuel P. King, District Judge, acknowledges preparation of this Petition by John S. Edmunds and Eric A. Seitz, attorneys for Petitioners, Real Parties in Interest, and concurs in all positions taken herein. This method of filing the Petition was followed to avoid duplication and repetition, for the convenience of this Court.